Supreme Court of the United States

OCTOBER TERM, 1968

No. 813

FRED FERNANDEZ,

Appellant,

—v.—

THOMAS J. MACKELL, DISTRICT ATTORNEY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES DISTRICT COURT

Civil Docket 68 Civ. 1030

68 Civ. 1176 consolidated with this action for all purposes

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA MCPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROCKWARD, URSULA VIRGINIA WEST, MILTON ELLIS

vs.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York

For plaintiff:

RABINOWITZ, BOUDIN & STANDARD, 30 East 42nd Street, NYC 10017 (OX 7-8640)
(ELEANOR JACKSON PIEL, 36 W. 44th St., NYC 10036, MU 2-8288)

For defendant:

LOUIS J. LEFKOWITZ, Atty. Gen'l., State of NY, 80 Centre St., NYC 10013
PETER J. O'CONNOR, D.A., Queens County (for Thomas J. Mackell), 126-05 Hoover Ave., Kew Gardens, NY 11415
PETER J. O'CONNOR (For Thomas J. Mackell), 125-01 Queens Blvd., Kew Gardens, NY 11415

Statistical Record	Costs	Date	Name or Receipt No.	Rec.	Disb.
J.S. 5 mailed x	Clerk	3-12-68	Rabinowitz	15-	
		3-15-68	US Treas		15-
		7-15-68	Rabinowitz	5-	
J.S. 6 mailed ✓	Marshal	7-16-68	US Treas		5-
Basis of Action: Violation of the Constitutional Rights	Docket fee				
	Witness fees				
Action arose at:	Depositions				

Date	PROCEEDINGS
Mar. 12-68	Filed complaint and issued summons.
Mar. 12-68	Filed affidavit and order permitting Jonathan Miller to serve summons and complaint. Clerk.
Mar. 15-68	Filed Order to Show Cause re: 3-Judge Court, etc. Ret. 3/19/68. Herlands, J.
Mar. 15-68	Filed Memorandum in support of motion.
Mar. 15-68	Filed Affidavit of Personal Service.
Mar. 15-68	Filed summons & return, service as follows: Louis J. Lefkowitz, Atty Gen'l, State of N.Y. by M. Sattler 3-12-68 Thomas J. Mackell, D.A., Queens County by Mrs. Coogan In EDNY 3-12-68 (service made pursuant to order filed 3-12-68)
Mar. 19-68	Filed (in court) Affidavit in opposition.
Apr. 9-68	Filed MEMORANDUM OPINION #34631. Bryan, J. * * * I find that the plaintiffs have made a sufficient showing to warrant the convening of a 3-judge statutory court under 28 USC ¼.2281. I have duly notified the Chief Judge of this Circuit to this effect pur. to 28 USC P.2284. Since the case Fernandez v Mackell, 68 Civ. 1176 (transferred to this court from Eastern Dist. of N.Y.) presents the same issues as 68 Civ. 1030, the two actions are consolidated for ALL purposes. It is so ordered. (mailed notice) (Also in 68 Civ. 1176) returned to Judge
Apr. 22-68	Filed order designating Friendly, C.J., Wyatt, J. & Bryan, J. as 3 Judge Court.—Lumbard, Ch. C.J.
Apr. 24-68	Filed order—all applications of parties for temporary & final relief will be heard before the court of Three judges duly designated herein on 5-17-68 at 10:30 a.m. in Court room 1505 of this court; answers will be served & filed not later than 4-30-68; all papers & main briefs in support of applications to the three-

Date	PROCEEDINGS
	judge court will be served & filed not later than 5-6-68; all answering papers & answering briefs will be served & filed not later than 12:00 noon 5-15-68; and the parties will fully comply with Rule 25 of the Gen'l. Rules of this court.—Bryan, J.—mailed notice
Apr. 30-68	Filed deft's (Louis J. Lefkowitz, Atty. Gen'l., State of N.Y.) ANSWER, pro se
Apr. 30-68	Filed deft's (Thomas J. Mackell, D.A., Queens Cty.) ANSWER, PJO
May 6-68	Filed Plaintiffs' Memorandum in support of their motion for summary judgment.
May 6-68	Filed Motion for Summary Judgment under Rule 56 Ret. Room 1505 on 5/17/68.
May 8-68	Filed notice of hearing on 5-17-68, sent to attys. by certified mail this date
May 10-68	Filed Amended and Supplemental ANSWER of Thomas J. Mackell. (Samuels, etc. vs. Mackell) PJO'C
May 10-68	Filed Amended and Supplemental ANSWER of Thomas J. Mackel. (Fernandez vs. Mackell) PJO'C
May 15-68	Filed Defendants' Memorandum in opposition to pltf's motion for summary judgt. (Also in 68 Civ. 1176.
May 15-68	Filed Affidavit of Paul Livoti. (Also in 68 Civ. 1176).
May 15-68	Filed pltff's (Fred Fernandez, 68-1176) notice of motion for summary judgment-ret. 5-17-68 in Rm. 1605 at 10:30 A.M.
May 17-68	Before 3 Judge Court—Hearing held & concluded. Decision reserved.

Date	PROCEEDINGS
Jun. 26-68	Filed 3 Judge Court OPINION #34931—Since the complaints present no case for federal relief, the Clerk is directed to enter a judgment of dismissal, as prayed for by the State.—Friendly, C.J., Bryan, J. & Wyatt, J.—mailed notice. JUDGMENT Ent. Clerk
Jul. 15-68	Filed Notice of Motion before a 3-Judge Court (Friendly, Bryan and Wyatt,) re: Enjoin defendant.
Jul. 15-68	Filed Notice of Appeal (mailed copies) (Also in 68 Civ. 1196.)
Jul. 22-68	Filed Affidavit of Peter J. O'Connor in behalf of deft. Attorney General. ('Also in 68 Civ. 1196)
Jul. 22-68	Filed MEMO.END. on motion papers (filed 7/15/68) copy filed this day, with copy of Affid. of Peter J. O'Connor. Upon the consent of counsel for the defendants, the within motion for a stay is granted, conditioned upon the diligent prosecution of the appeal taken by plaintiffs to the Supreme Court of the U.S. Friendly, U.S.C.J., and Bryan, U.S.D.J.
Aug. 16-68	Filed order directing Clerk of this Court to transmit to the Clerk of the Supreme Court all the original papers which are the record on appeal, to be returned upon conclusion

UNITED STATES DISTRICT COURT

Civil Docket 68 Civ. 1176

FRED FERNANDEZ

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York

For plaintiff:

ELEANOR JACKSON PIEL, 36 W. 44th St., NYC. 10036 (MU 2-8288)

For defendant:

LOUIS J. LEFKOWITZ, Atty. Gen'l., State of NY, 80 Centre St., NYC 10013

PETER J. O'CONNOR, D.A., Queens County (for Thomas J. Mackell), 126-05 Hoover Ave., Kew Gardens, NY 11415

Filed cause on transfer from East. Dist. of N.Y. (68 Civ. 228)

Statistical Record	Costs
J.S. 5 mailed x	Clerk
J.S. 6 mailed	Marshal
Basis of Action: Violation of Constitutional Rights	Docket fee
	Witness fees
Action arose at:	Depositions

Date	PROCEEDINGS
Mar. 22-68	Filed papers originally filed in East. Dist. of N.Y., were this day filed; complaint, request of personal svce., order to cause, affdvt. of Sidney Baumgarten, hearing on show cause byfore Zavatt, Ch.J., order to transfer & copy of dockett sheet
	RECORD OF PROCEEDINGS SDNY
Apr. 9-68	Filed MEMORANDUM OPINION #34631. Bryan, J. * * * I find that the plaintiffs have made a sufficient showing to warrant the convening of a 3-judge statutory court under 28 USC P 2281. I have duly notified the Chief Judge of this Circuit to this effect pur. to 28 USC. P. 2284. Since the case Fernandez v Mackell, 68 Civ. 1176 (transferred to this court from Eastern Dist. of N.Y.) presents the same issues as 68 Civ. 1030, the two actions are consolidated for ALL purposes. It is so ordered. (mailed notice) Filed in 68 Civ. 1030.
Apr. 22-68	Filed order designating Friendly, C.J., Wyatt, J. & Bryan, J. as 3 Judge Court.—Lumbard, CH.C.J. (filed in 68 Civ. 1030)
Apr. 24-68	Filed order—all applications of parties for temporary & final relief will be heard before the court of three judges duly designated herein on 5-17-68 at 10:30 a.m. in Court room 1505 of the court; answers will be served & filed not later than 4-30-68; all papers & main briefs in support of applications to the three-judge court will be served & filed not later than 5-6-68; all answering papers & answering briefs will be served & filed not later than 12:00 noon 5-15-68; and the parties will fully comply with Rule 25 of the Gen'l. Rules of this court.—Bryan, J.—mailed notice (filed in 68 Civ. 1030)

Date	PROCEEDINGS
Apr. 30-68	Filed deft's (Louis J. Lefkowitz, Atty. Gen'l, State of N.Y.) ANSWER, pro se
Apr. 30-68	Filed deft's (Thomas J. Mackell, D.A., Queens Cty.) ANSWER, PJO
May 6-68	Filed Supplemental Memorandum in support of declaratory and injunctive relief.
Aug. 28-69	Filed Memorandum in support of application for a 3-judge court, with letter to Ryan, J.
	THIS CASE CONSOLIDATED WITH 68 Civ. 1030 FOR ALL PURPOSES.
	NO FURTHER ENTRIES ON THIS SHEET

UNITED STATES DISTRICT COURT

Docket 68 C 228

FRED FERNANDEZ

vs

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York

For Plaintiff:

ELEANOR JACKSON PIEL, 36 W. 44th St., N.Y. 10036 MU 2-8288

BASIS OF ACTION: Pursuant to Title 28, U.S.C. Sec. 1343 (3) 2201, etc.

SEEKS: Injunction and a Declaratory Judgment

JURY TRIAL CLAIMED ON

Date	Plaintiff'sAccount	Received	Disbursed
3-11-68	Complaint	15.00	
3-12-68	Pd. to Treas.		15.00

Filed, Mar. 22, 1968, U. S. District Court, S. D. of N. Y.

Date	FILINGS—PROCEEDINGS
3-11-68	COMPLAINT FILED. SUMMONS ISSUED, Amount Reported In Emolument Returns 1 JS 5
3-12-68	Request of personal service filed. Amount Reported In Emolument Returns 2
3-12-68	Order to show cause filed for injunction and declaratory relief and request for the convening of a thire-judge Court. (ret Mar 20, 1968), Amount Reported In Emolument Returns 3
3-20-68	Affidavit of Sidney Baumgarten filed in opposition to pltff's motion to convene a three judge court and for a temporary injunction. Amount Reported In Emolument Returns 4
3-20-68	Before ZAVATT, CH. J.—Hearing on show cause for injunction and declaratory relief, etc.—Motion granted on consent of all parties to transfer all papers to the Hon Justice Van Pelt Bryan. Judge of the Southern District of N.Y., U.S.D.C.
3-20-68	By ZAVATT, CH. J.—Motion for injunction and declaratory relief, etc. referred to Judge Frederick Van Pelt Bryan of the District Court for the Southern District of New York, with his consent and the consent of the attorneys for the respective parties. (See memorandum endorsed on back of motion papers)

UNITED STATES SUPREME COURT
WASHINGTON, D. C.

68 Civ. 1030

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA MCPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROCKWARD, URSULA VIRGINIA WEST, and MILTON ELLIS, PLAINTIFFS-APPELLANTS

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS-APPELLEES

68 Civ. 1196

FRED FERNANDEZ, PLAINTIFF-APPELLANT

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS-APPELLEES

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Opinion of Three-Judge Court—June 26, 1968

Plaintiff's Notice of Motion for Temporary Injunction

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Affidavit of Peter O'Connor

Memorandum Endorsed on Plaintiffs' Motion for Temporary Injunction

Order Authorizing Transmission of Original Papers to Supreme Court

Affidavit and Order Permitting William Brownbill to Serve Summons and Complaint

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Order to Show Cause and Reference to Judge Frederick van Pelt Bryan

Docket Sheet Eastern District (8C-228)

Answer of D. Thomas Mackell

Answer of D. Louis Lefkowitz

Supplemental Memorandum in Support of Declaratory Relief

Fred Fernandez Joinder in Motion for Summary Judgment

Memorandum in Support of Three-Judge Court and Letter

Clerk's Certificate

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

68C 228

FRED FERNANDEZ, PLAINTIFF

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

COMPLAINT FOR INJUNCTION AND DECLARATORY RELIEF—
Filed March 11, 1968

Plaintiff, Fred Fernandez, by his attorney, Eleanor Jackson Piel, for his complaint, alleges:

1.) Plaintiff, Fred Fernandez, is a resident of the State of New York, County of Queens, and is a black Afro-American citizen who is interested in and participates in many activities centered about the achievement of equality and freedom for all American citizens categorized as Negroes and Puerto Ricans. In order to effectuate these purposes plaintiff has associated himself with others to engage in peaceful protest activities protected by the First and Fourteenth Amendments, including, but not limited to, participation in demonstrations, community organization rallies, discussion groups and the distribution of printed and written material in support of these views. In pursuit of these objectives, plaintiff has joined with others in exercising his rights of free speech, press and assembly, as well as the right to petition his government for a redress of his grievances and those of his fellow citizens.

2.) Defendant Thomas J. Mackell is the District Attorney for the County of Queens, City and State of New York and is a citizen of the United States and a resident of the County of Queens. He is sued herein both in his individual and official capacity.

3.) Defendant Louis J. Lefkowitz is the Attorney General for the State of New York and upon information

and belief is a resident of the County of New York, City and State of New York, and he is sued herein in both his individual and official capacity. Pursuant to § 71 of the Executive Law of the State, he is authorized to appear in support of the constitutionality of a State statute where such statute is challenged as will appear in greater particularity, *infra*.

4.) This action is brought pursuant to Title 28 U.S.C. § 1343(3) 2201, 2202 and Title 42 U.S.C. § 1983. Plaintiff seeks to enjoin enforcement of State statutes as will appear more particularly, *infra*, and requests, therefore, the convening of a three-judge Court pursuant to Title 28 U.S.C. §§ 2281 and 2284.

5.) The defendant Mackell, acting pursuant to and under the color of certain New York State statutes, to wit: former Penal Law §§ 160, 161, 163 and 580(1), has initiated a course of conduct designed to subject the plaintiff and others similarly situated to the deprivation of the rights, privileges and immunities secured to him and them by the Constitution and laws of the United States, by commencing a prosecution against him and by threatening to continue such prosecution.

6.) In support of this unlawful purpose as set forth, defendant Mackell presented certain alleged facts to the Grand Jury of the County of Queens on or about June 12, 1967, which resulted in such Grand Jury indicting the plaintiff and others with the crimes of anarchy and conspiracy to commit anarchy as well as charging him with the violation of other provisions of the Penal Law of New York (Indictment No. 1224-67).

7.) Thereafter, and on June 21, 1967, the defendant Mackell caused the plaintiff to be arrested by officers of the New York City Police Department and to be arraigned in the Supreme Court of New York State in Queens County. Defendant Mackell further, in the interests of the harassment of the plaintiff, caused him to be held on $20,000.00 bail which was a sum said defendant knew would be difficult, if not impossible, for plaintiff to secure release from on bond. In fact, only after special application in Part XXII of the Supreme Court of the State of New York, Second Department, and over the objection of

the defendant Mackell, was plaintiff able to secure his reduction of bail to $5,000.00 and his release thereon after spending approximately five weeks in custody for lack of ability to post sufficient bond.

8.) Upon the arraignment of plaintiff and thereafter, continuously, defendant Mackell issued numerous press releases and caused to have issued numerous press releases and other public statements relating to the indictment and arrest of plaintiff and others charged with him in the said indictment relating to the indictment and arrest of plaintiff which releases and statements were widely reported in newspapers, on the radio and over television throughout the State of New York and the nation. In addition, defendant Mackell sought and secured an associated attempted murder indictment against Herbert B. Ferguson and Arthur Harris, both indicted as co-defendants with plaintiff on the said anarchy and conspiracy to commit anarchy charges. The press releases of defendant Mackell which followed so mixed these two separate indictments as to lead persons to believe that plaintiff was charged with conspiracy to commit murder as well as anarchy and conspiracy to commit anarchy.

9.) On or about January 10, 1968, a demurrer to the said indictment interposed by plaintiff was sustained by the Supreme Court of New York, County of Queens and the said indictment number 1224-67 was dismissed.

10.) Prior to the notification of plaintiff's counsel of the sustaining of the demurrers, and on or about January 15, 1968, defendant Mackell, following his unlawful design, obtained from the same Grand Jury which had returned the previous indictment number 1224-67 a new and superseding indictment number 134-68 charging the plaintiff, *inter alia*, again with violation of former Penal Law §§ 160, 161, 163 and 580(1). A copy of such indictment is marked Exhibit "A" and is annexed hereto.

11.) Former sections 160, 161, 163 and 580(1) of the Penal Law of New York are void on their face and as applied to the plaintiff and to the other persons named in said indictment in that they violate the First, Fifth and Fourteenth Amendments to the Constitution of the United States, being in violation of the guarantees of free speech,

press and assembly provided in said amendments; furthermore, said statutes are vague and indefinite in violation of the guarantee of due process of law. In addition, §§ 160, 161 and 163 are unconstitutional in that these sections have been superseded by Title 18 U.S.C. § 2385 (the Smith Act), by which Congress has preempted the field of legislation in the general area covered by the aforesaid statutes of the State of New York.

12.) The purpose and effect of the aforesaid indictments and of the publicity which attended them was to inhibit the plaintiff and others in the exercise of their rights of free speech, press and assembly; to so intimidate them and others similarly situated that they would hesitate to express their views on subjects of great national importance through fear or prosecution and imprisonment for long terms of years and to cause them to cease speaking and assembling and distributing printed and written material in support of the principles which they hold dear, as set forth in paragraph 1 hereinabove, because of fear of unjust imprisonment.

13.) Unless this court restrains the operation and enforcement of these unconstitutional statutes, the plaintiff and others similarly situated, including the other persons named in the indictment, will continue to suffer immediate and irreparable injury, in that they will continue to be persecuted and will be deterred, hindered and prevented from exercising their constitutional rights.

14.) The Grand Jury which returned the aforesaid indictments was selected, drawn and summoned pursuant to former §§ 596, 609 and 661 of the Judiciary Law of the State of New York; said sections violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States in that they impose a monetary qualification for grand jury service and the standards which they set for jury service are subjective standards, thus vesting the County Clerk with arbitrary power in the selection of Grand Jurors.

15.) Plaintiff has had no adequate remedy at law.

WHEREFORE, plaintiff prays for the following relief:

1.) That, pursuant to 28 U.S.C. §§ 2281 and 2284, a three-judge court be convened to hear and determine this proceeding;

2.) That a permanent injunction be issued, restraining the defendants, their agents, employees and all others acting in concert therewith, from enforcing former sections 160, 161, 163 and 580(1) of the Penal Law of the State of New York and from continuing the prosecutions thereunder;

3.) That a declaratory judgment be issued declaring that former sections 160, 161, 163 and 580(1) of the Penal Law are null and void on their face and, as applied to the plaintiff herein, being in violation of the United States Constitution;

4.) That a declaratory judgment be issued declaring that former sections 596, 609 and 661 of the Judiciary Law are null and void on their face and as applied to the indictment of the plaintiff herein, being in violation of the United States Constitution;

5.) That, pending the hearing and determination of the requests for permanent relief, an interlocutory injunction be issued restraining the defendant, his agents and employees and all others acting in concert therewith from prosecuting the plaintiff and from enforcing or attempting to enforce in any way the provisions of former sections 160, 161, 163 and 580(1) of the Penal Law of the State of New York; and

6.) For such other and further relief which to this court may seem just and proper in the premises.

ELEANOR JACKSON PIEL
Attorney for Plaintiff
Office and P. O. Address
36 West 44th Street
New York, New York 10036

[*Duly sworn to by Fred Fernandez jurat omitted in printing (all in italics)*]

EXHIBIT A TO COMPLAINT

SUPREME COURT : CRIMINAL TERM
QUEENS COUNTY

No. 134-68

Indictment Superseding No. 1224-67

THE PEOPLE OF THE STATE OF NEW YORK

—against—

MILTON ELLIS, a/k/a Clarence Milton Ellis, HERMAN BENJAMIN FERGUSON, FRED HERNANDEZ, ARTHUR HARRIS, AL HAYNES, a/k/a Edward Albert Haynes, MICHELLE KAUROUMA, MANDOLA MCPHERSON, HARRIET NOEL, HAMPTON WOODWARD ROOKARD, GEORGE SAMUELS, RAYMOND SMITH, MAX STANFORD, a/k/a Maxwell Curtis Stanford, MERLE STEWART, ABRAHAM C. TAYLOR, URSULA VIRGINIA WEST, DEFENDANTS

INDICTMENT FOR:

Advocacy of Criminal Anarchy as to All Defendants,
Conspiracy to Commit the Crime of Advocacy of Criminal Anarchy as to All Defendants.

Conspiracy to Commit the Crime of Arson in the Third Degree as to Milton Ellis, a/k/a Clarence Milton Ellis, Herman Benjamin Ferguson, Fred Fernandez, Arthur Harris, Mandola McPherson, Hampton Woodward Rookard, George Samuels, Raymond Smith and Abraham C. Taylor.

Permitting Premises to be Used for Assemblages of Anarchists as to Merle Stewart and George Samuels.

Possession of Weapons and Dangerous Instruments and Appliances as to Milton Ellis, a/k/a Clarence Milton Ellis, Herman Benjamin Ferguson, Arthur Harris, Al Haynes, a/k/a Edward Albert Haynes, Michelle Kaurouma, Mandola McPherson, Hampton Woodward Rookard, George Samuels, Merle Stewart and Abraham C. Taylor.

FIRST COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse the defendants aforenamed of the following crime: Advocacy of criminal anarchy, contrary to former penal law § 160 and § 161 subdivision 1, as added by chapter 371 § 1, of the laws of 1902, in that said defendants aforenamed, acting in concert, and being aided and abetted by accomplices known and unknown to the grand jury, on or about and between the 1st day of October, 1965 and the 21st day of June, 1967, partly in the county of Queens and partly elsewhere in places known and unknown to the grand jury, did wilfully, knowingly and intentionally advocate by word of mouth and in writing the duty, necessity and propriety of overthrowing and overturning organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies, by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities and other facilities, and against executive officials of said State and its various political subdiviisons and agencies, including peace officers thereof, and by assassination of said executive officials, and by other unlawful means and with the further intent that said acts be presently attempted and accomplished.

SECOND COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse the defendants aforenamed of the following crime: Advocacy of criminal anarchy, contrary to former penal law § 160 and § 161 subdivision 2, as added by chapter 371 § 1, of the laws of 1902, in that said defendants aforenamed, acting in concert, and being aided and abetted by accomplices known and unknown to the grand jury, on or about and between the 1st day of October, 1965 and the 21st day of June, 1967, partly in the county of Queens and partly elsewhere in places known and unknown to the grand jury, did wilfully, knowingly and intentionally print, publish, edit, issue, circulate, distribute and display certain papers and documents entitled,

"Total Resistance", "Community Self Defense", "The Struggle for Black State Power in the U. S." and other written and printed matter containing and advocating, advising and teaching the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies should be overthrown by force and violence, to wit, by sabotage of public transportation and communication facilities, assassination of police officers of said State and its various political subdivisions and agencies, and members of the State Guard of said State, and by other unlawful means, and with the further intent that said acts be presently attempted and accomplished.

THIRD COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse the defendants aforenamed of the following crime: Advocacy of criminal anarchy, contrary to former penal law § 160 and § 161 subdivision 4, as added by chapter 371 § 1, of the laws of 1902, in that said defendants aforenamed, acting in concert, and being aided and abetted by accomplices known and unknown to the grand jury, on or about and between the 1st day of October, 1965 and the 21st day of June, 1967, partly in the county of Queens and partly elsewhere in places known and unknown to the grand jury, did wilfully, knowingly and intentionally organize and help to organize and become a member of and voluntarily assemble with each other, the same constituting a society, group and assembly of persons formed to teach and advocate the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies, be overthrown by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities and other facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of said executive officials, and by other unlawful means and with the further intent that said acts be presently attempted and accomplished.

FOURTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse the defendants aforenamed of the following crime: Conspiracy as a misdemeanor, contrary to former penal law § 580, subdivision 1, as amended by chapter 893, § 6 of the laws of 1957, and chapter 611, § 1 of the laws of 1959, to commit a crime other than illegally selling narcotics or extortion, to wit: the crime of advocacy of criminal anarchy, contrary to the former penal law, § 161, subdivisions 1, 2 and 4, as added by chapter 371, § 1 of the laws of 1902, in that the said defendants aforenamed, acting in concert, and being aided and abetted by accomplices known and unknown to the grand jury, on or about and between the 1st day of October, 1965 and the 21st day of June, 1967, partly in the county of Queens and partly elsewhere in places known and unknown to the grand jury, did wilfully, knowingly and intentionally conspire, confederate and agree with each other and with persons known and unknown to the grand jury, to advocate criminal anarchy, by the following means, among others: by advocating by word of mouth and in writing the duty, necessity and propriety of overthrowing and overturning organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies, by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities and other facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of said executive officials, and by other unlawful means; by printing, publishing, editing, issuing, circulating, distributing and displaying certain papers and documents entitled, "Total Resistance", "Community Self Defense", "The Struggle for Black State Power in the U. S." and other written and printed matter containing and advocating, advising and teaching the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies should be overthrown by force and

violence, to wit, by sabotage of public transportation and communication facilities, assassination of police officers of said State and its various political subdivisions and agencies, and members of the State Guard of said State, and by other unlawful means; and by organizing and helping to organize and becoming a member of and voluntarily assembling with each other, the same constituting a society, group and assembly of persons formed to teach and advocate the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies, be overthrown by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities and other facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of said executive officials, and by other unlawful means; all with the further intent that said acts be presently attempted and accomplished.

OVERT ACTS

In furtherance of said conspiracy, the following acts beside such agreement were done to effect the object thereof by one or more of the parties to such agreement:

In order to effect the object thereof under subdivision 1, § 161 of the former penal law:

1. On or about the 5th day of October, 1965, the defendants HERMAN BENJAMIN FERGUSON and MILTON ELLIS, a/k/a Clarence Milton Ellis, and others known to the grand jury, discussed the importance of being proficient in terror tactics.

2. On or about the 9th day of December, 1965, the defendants acting in concert formed a certain gun club to be used as a cover and front for the possession of pistols and rifles.

3. On or about and between the 1st day of October, 1965 and the 21st day of June, 1967, the defendants acting in concert obtained rifles, shotguns and pistols.

4. On or about the 15th day of February, 1966, the defendants MILTON ELLIS, a/k/a Clarence Milton Ellis,

HERMAN BENJAMIN FERGUSON and HAMPTON WOODWARD ROOKARD, and others known to the grand jury, discussed the use of pipes and gunpowder for the making of bombs.

5. On or about the 12th day of July, 1966, the defendants ABRAHAM C. TAYLOR, MILTON ELLIS, a/k/a Clarence Milton Ellis, HERMAN BENJAMIN FERGUSON, HAMPTON WOODWARD ROOKARD, an others known to the grand jury discussed tactics to be used in guerrila warfare.

6. On or about the 5th day of May, 1967, the defendants, acting in concert, obtained and possessed in the county of Queens an indeterminate amount of gun powder for making explosives.

7. On or about the 5th day of May, 1967, the defendants acting in concert, obtained and stored cans of gasoline.

In order to effect the object thereof under subdivision 2, § 161 of the former penal law:

8. On or about the 7th day of June, 1966, the defendant MILTON ELLIS, a/k/a Clarence Milton Ellis, HERMAN BENJAMIN FERGUSON and MERLE STEWART discussed the printing of literature on how to launch an explosive with a rifle.

9. On or about the 9th day of July, 1966, the defendants MILTON ELLIS, a/k/a Clarence Milton Ellis, HERMAN BENJAMIN FERGUSON and MERLE STEWART discussed the printing of literature on how to disable Police Cars.

10. On or about the 13th day of September, 1966, the defendants HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, HAMPTON WOODWARD ROOKARD, and others known to the grand jury, prepared and discussed a "Community Self Defense" leaflet.

11. On or about the 23rd day of April, 1967, the defendants distributed literature "The Struggle for Black State Power in the U. S."

In order to effect the object thereof under subdivision 4, § 161 of the former penal law:

12. On or about the 12th day of July, 1966, the defendants MILTON ELLIS, a/k/a Clarence Milton Ellis, HERMAN BENJAMIN FERGUSON, MANDOLA McPHERSON, HAMPTON WOODWARD ROOKARD, GEORGE SAMUELS, ABRAHAM C. TAYLOR and URSULA VIRGINIA WEST met and discussed tactics on Guerrilla Warfare.

13. On or about the 13th day of September, 1966, the defendants HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, HAMPTON WOODWARD ROOKARD, GEORGE SAMUELS and URSULA VIRGINIA WEST met and discussed "Community Self Defense" leaflets.

14. On or about the 20th day of September, 1966, the defendants HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, HAMPTON WOODWARD ROOKARD, MERLE STEWART and URSULA VIRGINIA WEST met and discussed literature "The Struggle for Black State Power in the U. S."

15. On or about the 4th day of April, 1967, the defendants HERMAN BENJAMIN FERGUSON, FRED FERNANDEZ, ARTHUR HARRIS, RAYMOND SMITH and ABRAHAM C. TAYLOR met and discussed organizing the youth for acts of violence in Queens County.

16. On or about the 22nd of January, 1967, the defendants AL HAYNES a/k/a Edward Albert Haynes, MICHELLE KAUROUMA, HARRIET NOEL and MAX STANFORD, a/k/a Maxwell Curtis Stanford, met and discussed the use of the Black Guard to take care of Traitors and Uncle Toms.

17. On or about the 12th day of February, 1967, the defendants MICHELLE KAUROUMA, HARRIET NOEL and others met and discussed the use of disguise kits in terror tactics.

18. On or about the 16th day of April, 1967, the defendants AL HAYNES, a/k/a Edward Albert Haynes, MICHELLE KAUROUMA, and HARRIET NOEL met and discussed the group's role as revolutionaries.

19. On or about the 23rd day of April, 1967, the defendants AL HAYNES, a/k/a Edward Albert Haynes, MICHELLE KAUROUMA, HARRIET NOEL and MAX STANFORD, a/k/a Maxwell Curtis Stanford, met and discussed the literature, "The Struggle for Black State Power in the U. S."

FIFTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MILTON ELLIS, a/k/a Clarence Milton Ellis, HERMAN BENJAMIN FERGUSON, FRED FERNANDEZ, ARTHUR HARRIS, MANDOLA McPHERSON, HAMPTON WOODWARD ROOKARD, GEORGE SAMUELS, RAYMOND SMITH and ABRAHAM C. TAYLOR of the following crime: Conspiracy as a felony, contrary to the former penal law § 580-a., as added by chapter 611 § 2, of the laws of 1959, to commit the crime of arson, to wit: the crime of arson in the third degree, contrary to the former penal law, § 223, as amended by chapter 154 of the laws of 1913 and chapter 895 of the laws of 1936, in that the said persons aforenamed, acting in concert, and being aided and abetted by accomplices known and unknown to the grand jury, on or about and between the 1st day of October, 1965 and the 21st day of June, 1967, partly in the county of Queens and partly elsewhere in places known and unknown to the grand jury, did wilfully, knowingly and intentionally conspire, confederate and agree with each other and with persons known and unknown to the grand jury, to wilfully burn and set on fire certain public transportation facilities and certain premises used for storage of tires and lumber, all located in the county of Queens, by use of ignited gasoline and other incendiary means.

OVERT ACTS:

In furtherance of said conspiracy, the following acts beside the agreement to commit such crime were done to effect the object of the agreement by one or more of such persons:

1. On or about the 26th day of April, 1967, the defendants HERMAN BENJAMIN FERGUSON and AR-

THUR HARRIS marked the locations of two lumber yards and tire company on a Queens map.

2. On or about the 26th day of April, 1967, the defendants HERMAN BENJAMIN FERGUSON and ARTHUR HARRIS went to the vicinity of Sutphin Boulevard and Liberty Avenue, in the County of Queens, for the purpose of observing a lumber yard.

3. On or about the 29th day of April, 1967, the defendant ARTHUR HARRIS went to the vicinity of New York Boulevard and Liberty Avenue, in the County of Queens, for the purpose of observing a tire company.

4. On or about the 5th day of May, 1967, the defendants, acting in concert, in the County of Queens, obtained and stored cans of gasoline.

5. On or about the 5th day of May, 1967, the defendants, acting in concert, obtained and stored an indeterminate amount of gun powder.

SIXTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse GEORGE SAMUELS of the following crime: Permitting premises, to be used for assemblages of anarchists, contrary to the former penal law, § 163, as added by chapter 371, § 1, of the laws of 1902, in that the said person aforenamed, on or about and between the 1st day of June, 1966 and the 21st day of June, 1967, in the county of Queens, as owner, agent, tenant or occupant, did wilfully, knowingly and intentionally permit in premises located at number 120-03 New York Boulevard, an assemblage of persons assembled for the purpose of advocating and teaching the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies should be overthrown by force and violence.

SEVENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MERLE STEWART of the following crime: Permitting premises to be used for assemblages of anarchists, contrary to the former penal law,

§ 163, as added by chapter 371, § 1, of the laws of 1902, in that the said person aforenamed, on or about and between the 1st day of June, 1966 and the 21st day of June, 1967, in the county of Queens, as owner, agent, tenant or occupant, did wilfully, knowingly and intentionally permit in premises located at number 111-29 179th Place, an assemblage of persons assembled for the purpose of advocating and teaching the doctrine that organized government, to wit, the governments of the State of New York and its various political subdivisions and agencies should be overthrown by force and violence.

EIGHTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MILTON ELLIS, a/k/a Clarence Milton Ellis, of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one 6.35 calibre pistol; serial number 434047; model number X15, contrary to former penal law § 1897, subdivision 3, as amended by chapter 136 of the laws of 1963.

NINTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MILTON ELLIS, a/k/a Clarence Milton Ellis of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one rifle; serial number P4230; model number 1915; manufacturer; Bresca; description: brown cover contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

TENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MILTON ELLIS, a/k/a Clarence Milton Ellis of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one 12 gauge double barrell shotgun; manufacturer: National Arms Company; police department city of New York serial number A44662, contrary to former penal

law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

ELEVENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MILTON ELLIS, a/k/a Clarence Milton Ellis of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 21002; manufacturer: Savage; description: brown case, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

TWELFTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MILTON ELLIS, a/k/a Clarence Milton Ellis of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; model number DM 15; manufacturer: Remington; contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

THIRTEENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one 7.65 calibre pistol; serial number 768C73; manufacturer: Barreta, contrary to former penal law § 1897, subdivision 2, as amended by chapter 136 of the laws of 1963.

FOURTEENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 74718; manufacturer: Armalite, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

FIFTEENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; model number 120A; manufacturer: Springfield; description: .22 calibre scope, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

SIXTEENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one 6.5 calibre rifle; serial number A57027; manufacturer: Italian; description: brown case, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

SEVENTEENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one shotgun; serial number 68521; manufacturer: Stevens, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

EIGHTEENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 14245; manufacturer: Remington; description: green case, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

NINETEENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 16747; manufacturer: Remington; description: green case, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

TWENTIETH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 24903; manufacturer: Remington; description: green case, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

TWENTY-FIRST COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and applicances, to wit, one .22 calibre rifle; serial number 26448; manufacturer: Remington; description: green case, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

TWENTY-SECOND COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .30 calibre M-1 rifle; serial number 5718214; manufacturer: H&R; description: green case, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

TWENTY-THIRD COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .30 calibre M-1 rifle; serial number 1102168; description: green case, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

TWENTY-FOURTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .30 calibre M-1 rifle; serial number 2511161; description: green case, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

TWENTY-FIFTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .30 calibre M-1 rifle; serial number 2016256; description: green case, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

TWENTY-SIXTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FERGUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .30 calibre M-1 rifle; serial number 1022954; description: green case, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

TWENTY-SEVENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HERMAN BENJAMIN FER-

GUSON of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one Eagle carbine rifle; serial number 25135 contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

TWENTY-EIGHTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse ARTHUR HARRIS of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one 6.35 calibre pistol; serial number 434015; manufacturer: Galesi, contrary to former penal law § 1897, subdivision 3, as amended by chapter 136 of the laws of 1963.

TWENTY-NINTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse ARTHUR HARRIS of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 74089; manufacturer: Armalite, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

THIRTIETH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse ARTHUR HARRIS of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .30 calibre rifle; serial number 4102779 contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

THIRTY-FIRST COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse ARTHUR HARRIS of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one eagle carbine rifle; serial number 25068 contrary to former penal law § 1897,

subdivision 9, as amended by chapter 136 of the laws of 1963.

THIRTY-SECOND COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse AL HAYNES, a/k/a Edward Albert Haynes of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 25439B; model X15, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

THIRTY-THIRD COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MICHELLE KAUROUMA of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 78096; manufacturer: Armalite, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

THIRTY-FOURTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MANDOLA McPHERSON of the following crime: Possession of weapons and dangerous instrument and appliances, to wit, one .22 calibre rifle; model number 81DL; manufacturer: Marlin; description: scope, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

THIRTY-FIFTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HAMPTON WOODWARD ROOKARD of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one rifle .22 calibre, serial number 6329, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

THIRTY-SIXTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HAMPTON WOODWARD ROOKARD, of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre Remington rifle, serial number 141408, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

THIRTY-SEVENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HAMPTON WOODWARD ROOKARD of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .30-.30 Marlin rifle, serial number P12648 contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

THIRTY-EIGHTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HAMPTON WOODWARD ROOKARD of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre Winchester rifle, serial number 114163D, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

THIRTY-NINTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HAMPTON WOODWARD ROOKARD of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one Noble double barrel shotgun, AB 18013, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

FORTIETH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HAMPTON WOODWARD ROOKARD, of the following crime: Possession of weap-

ons and dangerous instruments and appliances, to wit, one rifle: Stevens model 87; .22 calibre, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

FORTY-FIRST COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse HAMPTON WOODWARD ROOKARD of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 503917; manufacturer: Winchester, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

FORTY-SECOND COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse GEORGE SAMUELS of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one 6.35 calibre pistol; serial number 95232; manufacturer: Reck, contrary to former penal law § 1897, subdivision 3, as amended by chapter 136 of the laws of 1963.

FORTY-THIRD COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse GEORGE SAMUELS of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one New England West. rifle; serial number 683459, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

FORTY-FOURTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse GEORGE SAMUELS of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; manufacturer: Marlin, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

FORTY-FIFTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MERLE STEWART of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one zip gun; antenna barrel bound in black plastic tape; police department, city of New York, serial number 36071, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

FORTY-SIXTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MERLE STEWART of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one zip gun antenna barrel bound in black plastic tape; police department, city of New York, serial number 36072, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

FORTY-SEVENTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse MERLE STEWART of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one .22 calibre rifle; serial number 71387; manufacturer: Armalite, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

FORTY-EIGHTH COUNT:

The grand jury of the county of Queens, by this count in this indictment, accuse ABRAHAM C. TAYLOR of the following crime: Possession of weapons and dangerous instruments and appliances, to wit, one carbine rifle; serial number 4070, contrary to former penal law § 1897, subdivision 9, as amended by chapter 136 of the laws of 1963.

/s/ Thomas J. Mackell
District Attorney

No. 134-68

Superseding Indictment No. 1224-67

Bond

Filed day of 19

Pleading

SUPREME COURT : CRIMINAL TERM
QUEENS COUNTY

THE PEOPLE

vs.

MILTON ELLIS, a/k/a Clarence Milton Ellis, HERMAN BENJAMIN FERGUSON, FRED HERNANDEZ, ARTHUR HARRIS, AL HAYNES, a/k/a Edward Albert Haynes, MICHELLE KAUROUMA, MANDOLA MCPHERSON, HARRIET NOEL, HAMPTON WOODWARD ROOKARD, GEORGE SAMUELS, RAYMOND SMITH, MAX STANFORD, a/k/a Maxwell Curtis Stanford, MERLE STEWART, ABRAHAM C. TAYLOR, URSULA VIRGINIA WEST, DEFENDANTS

THOMAS J. MACKELL,
District Attorney.

INDICTMENT FOR:

Advocacy of Criminal Anarchy as to All Defendants,
Conspiracy to Commit the Crime of Advocacy of Criminal Anarchy as to All Defendants.

Conspiracy to Commit the Crime of Arson in the Third Degree as to Milton Ellis, a/k/a Clarence Milton Ellis, Herman Benjamin Ferguson, Fred Fernandez, Arthur Harris, Mandola McPherson, Hampton Woodward Rookard, George Samuels, Raymond Smith and Abraham C. Taylor.

Permitting Premises to be Used for Assemblages of Anarchists as to Merle Stewart and George Samuels.

Possession of Weapons and Dangerous Instruments and Appliances as to Milton Ellis, a/k/a Clarence Milton Ellis, Herman Benjamin Ferguson, Arthur Harris, Al Haynes, a/k/a Edward Albert Haynes, Michelle Kaurouma, Mandola McPherson, Hampton Woodward Rookard, George Samuels, Merle Stewart and Abraham C. Taylor.

A TRUE BILL
Foreman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1176

Received April 30, 1968, By Mail

FRED FERNANDEZ, PLAINTIFF

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

ANSWER

Thomas J. Mackell, District Attorney of Queens County, defendant, by Peter J. O'Connor, his attorney, as and for an answer alleges:

1. Denies each and every allegation contained in the complaint in paragraphs numbered 4, 5, 11, 12, 13, 14 and 15.

2. Denies knowledge and information sufficient to form a belief as to the allegations contained in paragraph 1 of the complaint.

3. Denies each and every allegation contained in the complaint in paragraph 6 except admits that on or about June 12, 1967 a grand jury in the county of Queens indicted the plaintiff and others.

4. Denies each and every allegation contained in the complaint in paragraph 7 thereof except admits that on June 21, 1967 the plaintiff herein was arrested by officers of the New York City Police Department.

5. Denies each and every allegation contained in the complaint in paragraph 8 except denies knowledge or information sufficient to form a belief as to those allegations relating to the reportage of the circumstances herein over radio and television throughout the state of New York and the nation and admits that a press release was issued with respect to the arrest of the said plaintiff and others.

6. Denies each and every allegation contained in the complaint in paragraph 10 except admits that on or about January 15, 1968 the aforesaid grand jury found a superseding indictment, number 134-68.

WHEREFORE the defendant Thomas J. Mackell respectfully prays for a judgment dismissing the complaint herein and for such other and further relief as may be just and proper in the premises.

PETER J. O'CONNOR
Attorney for Defendant
Thomas J. Mackell
125-01 Queens Boulevard
Kew Gardens, New York 11415

By /s/ Peter J. O'Connor

[*Duly sworn to by Peter J. O'Connor jurat omitted in printing (all in italics)*]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1176

Received April 30, 1968, By Mail

FRED FERNANDEZ, PLAINTIFF

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

ANSWER

Louis J. Lefkowitz, Attorney General for the State of New York, defendant herein, appearing pro se, as and for his answer, respectfully alleges:

1. Denies each and every allegation contained in the complaint in paragraphs numbered 4, 5, 11, 12, 13, 14 and 15.

2. Denies knowledge and information sufficient to form a belief as to the allegations contained in paragraph 1 of the complaint.

3. Denies each and every allegation contained in the complaint in paragraph 6 except admits that on or about June 12, 1967 a grand jury in the county of Queens indicted the plaintiff and others.

4. Denies each and every allegation contained in the complaint in paragraph 7 thereof except admits that on June 21, 1967 the plaintiff herein was arrested by officers of the New York City Police Department.

5. Denies each and every allegation contained in the complaint in paragraph 8 except denies knowledge or information sufficient to form a belief as to those allegations relating to the reportage of the circumstances herein over radio and television throughout the state of New York and the nation and admits that a press release was issued with respect to the arrest of the said plaintiff and others.

6. Denies each and every allegation contained in the

complaint in paragraph 10 except admits that on or about January 15, 1968 the aforesaid grand jury found a superseding indictment, number 134-68.

WHEREFORE the defendant Louis J. Lefkowitz respectfully prays for a judgment dismissing the complaint herein and for such other and further relief as may be just and proper in the premises.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Appearing pro se
80 Centre Street
New York, New York

By /s/ Mortimer J. Sattler
MORTIMER J. SATTLER
Asst. Atty. Gen.

[*Duly sworn to by Mortimer J. Sattler jurat omitted in printing (all in italics)*]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1030

FRED FERNANDEZ, PLAINTIFF

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

AMENDED SUPPLEMENTAL ANSWER

Thomas J. Mackell, District Attorney of Queens County, defendant, by Peter J. O'Connor, his attorney, and Louis

J. Lefkowitz, Attorney General of the State of New York, defendant, appearing pro se, as and for an amended supplemental answer allege:

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

Paragraph 5: The system of selecting grand jurors in the County of Queens is non-discriminatory.

Paragraph 6: All citizens in the County of Queens over the age of 21 and not disqualified by reason of mental or physical disability are eligible to serve as grand or petit jurors.

Paragraph 7: There is no class of citizens in the County of Queens who are discriminated against insofar as jury service is concerned by the terms of the statute.

WHEREFORE the defendants Thomas J. Mackell and Louis J. Lefkowitz respectfully pray for a judgment dismissing the complaint herein and for such other and further relief as may be just and proper in the premises.

PETER J. O'CONNOR
Attorney for Defendant
Thomas J. Mackell
125-01 Queens Boulevard
Kew Gardens, New York 11415

By .....
LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
80 Centre Street
New York, New York

By .....
MORTIMER SATTLER
Assistant Attorney General

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1030

Received by Mail May 16, 1968

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA MCPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST, MILTON ELLIS, PLAINTIFFS

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

68 Civ. 1176

FRED FERNANDEZ, PLAINTIFF

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

AFFIDAVIT OF PAUL LIVOTI

STATE OF NEW YORK)
) SS.:
COUNTY OF QUEENS)

I, PAUL LIVOTI, being duly sworn, depose and say:

1. I am the County Clerk of the County of Queens, State of New York and have been such since 1938.

2. As the Clerk of Queens County, it is my duty to provide jurors for the trial of all cases requiring jury service in Queens County.

3. In pursuance of such duty it has always been my practice to obtain jurors, both petit and grand, from the list of registered voters of Queens County.

4. In order to procure as broad-based a representation as possible, various plans have been experimented with and employed. For instance, at one time, selections were made from two or three non-contiguous assembly districts on an annual basis. This was not found to be altogether satisfactory because of problems arising out of the tendency of ethnic groups to localize themselves. Today we cover the entire County by taking each tenth election district from each assembly district. This procedure takes six to seven years to cover every registered male voter in the County. This I have found offers the best possibility of obtaining the most diversified collection of prospective jurors, representative of all ethnic groups in the entire County.

5. I estimate that annually, in order to supply the needs of Queens County, approximately 60,000 prospective jurors are summoned for examination and service. From this amount there is normal attrition consisting of removals, exempts, physically disabled and those who, for legal excuses obtain relief from service.

6. These approximately 60,000 prospective jurors are required to present themselves at my office in order to satisfactorily qualify. Among the questions formerly put to each, until the recent change in the law, is the one which I am advised is the main contention raised in the instant attack upon the former statute, namely, whether or not the prospective juror is the possessor of two hundred and fifty dollars ($250.00) in real or personal property. I state on information and belief that in my 30 years experience interviewing the aforesaid number each year there has never been a single individual responding by subpoena who has been rejected or disqualified from service as a trial or grand juror solely by reason of not having the aforesaid sum, either in real or personal property. There has been, in the past, out of this huge number, perhaps a few instances where an individual might have said that he lacked that sum. But when he was asked whether he considered the value of his personal property, such as clothing, household equipment and all other types of personal possessions, it became apparent to him that he was the possessor of that amount and in each case he was accepted as a prospective juror.

7. The list of grand jurors which has been maintained at 750 but is now required to be maintained at 1500 by January 1, 1969, is obtained from the list of trial jurors who have been accepted for service as such, the great majority of whom have already served. The requirements for grand jury service are no different generally from those of a trial juror except that each grand juror is required to state that he has no objection to the death penalty as now provided by law. Furthermore, each juror is advised and he must state that he has no objection to the Fifth Amendment and must have no prejudice against any law which would prevent finding a defendant guilty of violation of such law.

8. Of course, certain trial jurors are prohibited from acting as grand jurors. Reference is made specifically to city, county, state and federal employees.

9. It is my intention and purpose, just as in the case of trial jurors, to make the scope of the list of grand jurors as broad as possible in terms of county distribution. In this regard, I wish to inform this Court that I have made great efforts and still do to invite responsible individuals from all elements of Queens County society.

10. Annexed hereto are copies of form letters employed by me in connection with means of acquiring the services of prospective grand jurors. In preparation for the 1969 grand juror list, starting in the middle of February up to today, more than 3,000 invitations have been mailed to trial jurors and about 400 have accepted.

/s/ Paul Livoti

Sworn to before me this
13th day of May, 1968.

/s/ Joseph A. Hetterich
JOSEPH A. HETTERICH
Notary Public, State of New York
No. 41-1782600
Qualified in Queens County
Commission Expires March 30, 1969

[SEAL]

QUEENS COUNTY CLERK'S OFFICE
GENERAL COURTHOUSE

Sutphin Boulevard and 88th Avenue
Jamaica, N. Y. 11435

PAUL LIVOTI
County Clerk and Clerk
of the Supreme Court

544-9300

Your request to be considered for Grand Jury Service has been placed on file.

The annual list according to law must be prepared well in advance. Inasmuch as we have many more pending applications, it will be impossible to tell when you may be called to this office for examination and qualification.

However, as vacancies occur the new applicants will be notified.

I thank you for indicating to us your civic interest in our community.

Very truly yours,

/s/ Paul Livoti
County Clerk.

PL:fg

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[SEAL]

QUEENS COUNTY CLERK'S OFFICE
GENERAL COURTHOUSE

Sutphin Boulevard and 88th Avenue
Jamaica, N. Y. 11435

PAUL LIVOTI
County Clerk and Clerk
of the Supreme Court

544-9300

Dear Sir, Madam:

Your name has come to our attention for possible Grand Jury Service.

The list for next year is now being prepared and twenty-three (23) persons will be selected for service each month. A Grand Juror is called upon to serve usually about two days a week for one month.

If you are now a resident of this county, under seventy years of age, physically fit, and have made no previous application for Grand Jury service in this county, you are invited to call at this office on or before
between 9 A.M. and 12 Noon (except Saturday) to fill out the required questionnaire and to be fingerprinted.

County, City, State and Federal employees are not eligible.

Very truly yours,

County Clerk.

P.S. Please present this letter when calling to qualify.

/s/ P. L.

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[SEAL]

QUEENS COUNTY CLERK'S OFFICE
GENERAL COURTHOUSE

Sutphin Boulevard and 88th Avenue
Jamaica, N. Y. 11435

PAUL LIVOTI
County Clerk and Clerk
of the Supreme Court

544-9300

Sometime ago you expressed a desire to volunteer for Grand Jury Service.

If you are still interested and not more than 72 years old, you may personally call at this office on or before between the hours of 9 A.M. and 12 Noon (except Saturday) to fill out the required questionnaire and to be fingerprinted.

Very truly yours,

County Clerk.

P.S. Please present this letter when calling to qualify.

County, City, State or Federal employees are by law not eligible.

/s/ P. L.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1030

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA MCPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST, MILTON ELLIS, PLAINTIFFS

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

MOTION FOR SUMMARY JUDGMENT UNDER RULE 56—
May 6, 1968

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Victor Rabinowitz, duly sworn to the 6th day of May, 1968, and upon all of the pleadings and proceedings heretofore had herein, the undersigned will move this court on the 17th day of May, 1968, at the Courthouse thereof, Foley Square, Room 1505, at 10:30 o'clock in the forenoon, for summary judgment against the defendants pursuant to Rule 56 of the Rules of Civil Procedure:

1. Permanently enjoining the defendants, their agents, employees and all others acting in concert with them from enforcing former sections 160, 161, 163 and 580(1) of the Penal Law of the State of New York and from continuing the prosecutions of plaintiffs thereunder;

2. Permanently enjoining the defendants, their agents, employees and all others acting in concert with them from continuing to prosecute the plaintiffs herein under the First, Second, Third, Fourth, Sixth and Seventh counts of the indictment, a copy of which is annexed to the complaint herein.

3. Declaring former sections 160, 161, 163 and 580(1) of the Penal Law of the State of New York to be null and void on their face and as applied to the defendants herein, on the ground that they are in violation of the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and further on the ground that they have been superseded by the Smith Act, 18 U.S.C. § 2385.

4. Declaring former sections 596 and 609 of the Judiciary Law of the State of New York to be null and void on their face and as applied to the indictment of the plaintiffs herein, being in violation of the Fourteenth Amendment to the Constitution of the United States.

5. Directing such other and further relief as to the court may seem just and proper.

Dated, New York, N. Y., May 6, 1968

RABINOWITZ & BOUDIN
Attorneys for Plaintiffs
30 East 42nd Street
New York, N. Y. 10017

TO: Louis J. Lefkowitz
Attorney General, Defendant
80 Centre Street
New York, N. Y.

Peter J. O'Connor and Sidney Baumgarten
Attorneys for Defendant
Criminal Court
125-01 Queens Boulevard
Kew Gardens, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1030

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA MCPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST, MILTON ELLIS, PLAINTIFFS

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

AFFIDAVIT IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

Victor Rabinowitz, being duly sworn, deposes and says:

I am the attorney for the plaintiffs in the above matter and make this affidavit in support of a motion under Rule 56 of the Federal Rules of Civil Procedure for summary judgment permanently enjoining the prosecution of the plaintiffs for criminal anarchy, declaring the Criminal Anarchy Law of New York to be unconstitutional and further declaring former sections 569 and 609 of the Judiciary Law of the State of New York to be null and void.

There is now pending before this court a motion for a preliminary injunction against the prosecution of plaintiffs. All of the papers heretofore submitted to the court on that motion are incorporated herein by reference.

This motion is made because it appears that there are no issues of fact which need be tried and that the issues on the motion for a preliminary injunction and those on the motion for summary judgment granting final relief

will be substantially identical. Much time and effort on the part both of the court and the parties will therefore be saved if the court considers the proceeding on the merits at the present time.

There are no facts in dispute in this proceeding. The only allegations of the complaint which have been denied are those allegations which are conclusory, such as paragraph 4 of the complaint, which sets forth the grounds of the jurisdiction of this court and the several paragraphs of the complaint which assert that the statutes upon which the Queens prosecution is based are unconstitutional. The only issue of significance in this proceeding is a legal issue.

WHEREFORE, plaintiffs pray judgment as set forth in the notice of motion.

/s/ Victor Rabinowitz

Sworn to before me this
6th day of May, 1968

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1030

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA MCPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST, MILTON ELLIS, PLAINTIFFS

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

STATEMENT PURSUANT TO GENERAL RULE 9(G)

Plaintiffs contend that there is no general issue to be tried as to the following facts:

1. Plaintiffs are black citizens of the United States and residents of the State of New York.
2. Defendant Thomas J. Mackell is District Attorney for the County of Queens in the City and State of New York.
3. Defendant Louis J. Lefkowitz is Attorney General of the State of New York with power and duty to appear in litigation in which a question of constitutionality of a state statute is raised.
4. On or about June 12, 1967, the Grand Jury of Queens County found an indictment against the plaintiffs and others charging them with violation of former sections 160, 161, 163 and 580(1) of the Penal Law of New York.
5. Thereafter the defendant Mackell caused the plaintiffs and others named in the indictment to be arrested and to be arraigned in the Supreme Court of the State of New York in Queens County.
6. Upon the arraignment of said plaintiffs, the defendant Mackell issued numerous press releases and other

public statements relating to the indictment and the rest of the plaintiffs, which releases and statements were widely reported in newspapers throughout the State of New York.

7. Thereafter and on or about January 10, 1968, demurrers to certain counts of the indictment were sustained by the Supreme Court of the State of New York, County of Queens, and the indictment was dismissed.

8. On or about January 17, 1968, the Grand Jury of Queens County found a superseding indictment bearing No. 134-68.

9. That the indictment attached to the complaint is an accurate copy of said superseding indictment.

10. The Grand Jury which returned the aforesaid indictment was selected, drawn and summoned pursuant to sections 596 and 609 of the Judiciary Law of the State of New York.

RABINOWITZ & BOUDIN
Attorneys for Plaintiffs
30 East 42nd Street
New York, N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRED FERNANDEZ, PLAINTIFF

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

SIRS:

PLEASE TAKE NOTICE that the plaintiff, Fred Fernandez, joins in that certain motion for summary judgment dated May 6, 1968, filed by Rabinowitz, Boudin & Standard on behalf of George Samuels and others in

action number 68 Civ. 1030; and will so move this court on the 17th day of May, 1968, at the Courthouse thereof, Foley Square, Room 1605 at 10:30 o'clock in the forenoon for such relief against the defendants pursuant to Rule 56 of the Rules of Civil Procedure on all the grounds stated in that motion and its supporting papers and for the reasons stated in memoranda and papers filed herein.

Dated: New York, New York
May 10, 1968

/s/ ELEANOR JACKSON PIEL
ELEANOR JACKSON PIEL
Attorney for Plaintiff

To: Louis J. Lefkowitz
Attorney General of the
State of New York
80 Centre Street
New York, New York

Thomas J. Mackell
District Attorney
County of Queens
126-05 Hoover Avenue
Kew Gardens, New York

RABINOWITZ, BOUDIN & STANDARD
Attorneys for Plaintiff Samuels
30 East 42nd Street
New York, New York

"UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1030

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA MCPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST, MILTON ELLIS, PLAINTIFFS

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

68 Civ. 1176

FRED FERNANDEZ, PLAINTIFF

—against—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

MEMORANDUM OPINION
OF JUDGE FREDERICK V.P. BRYAN—April 9, 1968

"BRYAN, District Judge:

"The eleven plaintiffs in these two actions are under indictment in the New York Supreme Court, Queens County, for, among other crimes, advocacy of criminal anarchy, conspiracy to commit criminal anarchy and permitting premises to be used for assemblages of anarchists under former New York Penal Code Sections 160, 161 and 163.[1]

[1] The criminal anarchy laws under which the plaintiffs were indicted have been superseded by Section 240.15 of the new Penal Law.

These actions in which the District Attorney of Queens County and the New York Attorney General are named as defendants, seek judgments declaring that the New York criminal anarchy laws under which plaintiffs were indicted and New York statutes governing selection of the members of the grand jury which indicted them, are unconstitutional. They ask for a permanent injunction against further prosecution of these charges or enforcement of the criminal anarchy statutes and preliminary injunctive relief to the same effect. Pursuant to 28 U.S.C. § 2281, plaintiffs request that their application be heard by a District Court of three judges designated pursuant to 28 U.S.C. § 2284.

Plaintiffs claim that the New York criminal anarchy laws are unconstitutional on their face and as applied in that they curtail First Amendment freedoms of speech, press and assembly and are unconstitutionally vague in violation of the Fifth and Fourteenth Amendments. It is alleged that these laws were superseded by the Smith Act, 18 U.S.C. § 2385 and are unconstitutional for that reason also.

The plaintiffs also claim that the grand jury which indicted them was unconstitutionally drawn. They challenge on Fifth and Fourteenth Amendment grounds the requirements of § 596 of the New York Judiciary Law that a grand juror must 'be the owner of real or personal property of the value of two hundred and fifty dollars' [2] and must 'be intelligent, of sound mind and good character, well informed; able to read and write the English language understandably.' Section 609 and 661, which contain allegedly subjective criteria for the selection of grand jurors [3] are also attacked.

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[2] The requirement of property ownership is no longer in force, having been omitted by amendments to Sections 596 and 661, effective September 1, 1967. When the indictment against the plaintiffs was drawn, the property requirement was in effect.

[3] Section 609(1) requires investigation by the County Clerk of potential grand jurors. Section 661 provides for questionnaires to be filled out by prospective grand jurors, and, prior to September 1, 1967, it specifically provided for questions as to the two hundred and fifty dollars property requirement.

The sole issue before me at this time is whether the plaintiffs have raised substantial constitutional questions requiring a three-judge court to be designated to hear the application on the merits.

This case involves the question of whether the criminal anarchy laws of New York violate the First, Fifth and Fourteenth Amendments to the Constitution, and in my view this question is substantial. See, e.g., Harris v. Younger, —— F. Supp. —— (C.D. Cal., Mar. 11, 1968) (three-judge court); Ware v. Nichols, 266 F. Supp. 564 (d. Miss. 1967) (three-judge court). Although the Supreme Court held in Gitlow v. New York, 269 U.S. 652 (1921) that a conviction under Sections 160 and 161 for mere advocacy of criminal anarchy was constitutional, it is clear from subsequent Supreme Court decisions that *Gitlow*, though never expressly overruled, is no longer the law. See, e.g., Keyishian v. Board of Regents, 385 U.S. 589 (1967); Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494 (1951). In such circumstances, reconsideration of the constitutionality of these provisions by a three-judge court is not foreclosed. See Harris v. Younger, *supra*.

The recent reinterpretation of the criminal anarchy laws by the New York Court of Appeals in People v. Epton, 19 N.Y. 2d 496, 281 N.Y.S. 2d 9 (1967), cert. denied and appeal dismissed sub nom Epton v. New York, 390 U.S. 29 (1968) (per curiam), does not alter this conclusion. The effect of the *Epton* case upon the plaintiffs' claims has not been considered on the merits by the Supreme Court or by the courts of this circuit.[4]

It also appears that the Fifth and Fourteenth Amendment issues raised with respect to the New York Grand Jury statutes may not be insubstantial. It may be noted in this connection that the Court of Appeals of this cir-

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[4] The Supreme Court dismissed the appeal in Epton for want of a substantial federal question. This disposition is not decisive here since in that case Epton was sentenced to serve three concurrent terms, only two of which brought the anarchy statutes into question. See Epton v. New York, 390 U.S. at 29-30 (concurring opinion). See also id. at 30-35 (dissenting opinion.)

cuit in Chestnut v. New York, 370 F. 2d 1 (2d Cir. 1966), specifically left open the constitutionality of Sections 596 and 609, and characterized these constitutional issues as 'very serious' ones. 370 F. 2d at 7.

Defendants argue that the abstention doctrine should be applied in this case. With respect to plaintiffs' attack on the criminal anarchy statutes, the recent decision in Zwickler v. Koota, 389 U.S. 241 (1967), indicates that abstention may not be appropriate. In any event the question of abstention under the circumstances here is one to be determined by the three-judge court and not by the District Court to whom the application is originally made.

In short, I find that the plaintiffs have made a sufficient showing to warrant the convening of a three-judge statutory court under 28 U.S.C. § 2281.

I have duly notified the Chief Judge of this Circuit to this effect pursuant to 28 U.S.C. § 2284.

There is one further detail. One of these two actions, Fernandez v. Mackell, 68 Civ. 1176, was originally brought in the Eastern District of New York and was transferred to this court with the consent of the court and of the parties. Since it presents the same issues as Samuels v. Mackell, 68 Civ. 1030, originally commenced in this court and was argued before me at the same time, the two actions are consolidated for all purposes.

It is so ordered.

Dated: New York, N. Y.
April 9, 1968

/s/ FREDERICK v.P. BRYAN
United States District Judge

"UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1030

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA MCPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROCKARD, URSULA VIRGINIA WEST and MILTON ELLIS, PLAINTIFFS

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

68 Civ. 1196

FRED FERNANDEZ, PLAINTIFF

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, DEFENDANTS

DECISION OF THREE-JUDGE COURT—June 27, 1968

Heard May 17, 1968 before:

FRIENDLY, *Circuit Judge*, BRYAN and WYATT, *District Judges.*

"APPEARANCES:

Victor Rabinowitz (Rabinowitz, Boudin & Standard, New York, N. Y.), for Plaintiffs George Samuels, Abraham C. Taylor, Herman Benjamin Ferguson, Arthur Harris, Mandola McPherson, Max Standord, Merle Stewart, Hampton Woodward Rockward, Ursula Virginia West and Milton Ellis.

Isidore Beerman, New York, N. Y., for Plaintiff Ursula West.

Eleanor Jackson Piel, New York, N. Y., for Plaintiff Fred Fernandez.

Peter J. O'Connor, Queens, N. Y. (Mortimer Sattler, Ass't. Attorney General of New York State, New York, N. Y., Patrick J. Broderick on brief), for Defendants Thomas J. Mackell and Louis J. Lefkowitz.

FRIENDLY, Circuit Judge:

"Plaintiffs in these consolidated actions [1] are the subjects of a superseding indictment filed by a grand jury in the Supreme Court for Queens County, New York. The indictment contains 43 counts, many of these being against only one or some of the plaintiffs. Forty-one counts charge violations of former New York Penal Law § 1897 [2] relating to the possession of weapons. Another count alleges conspiracy to commit arson in the third degree, Penal Law § 223. What concerns us are counts charging criminal anarchy.

The first count alleges advocacy of criminal anarchy in violation of §§ 160 and 161-1, see fn. 4, in that defendants advocated orally and in writing the overthrow of the governments of the State and its political subdivisions "by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of said executive officials, and by other unlawful means and with the further intent that said acts be presently attempted and accomplished." The second count asserts that, in violation of §§ 160 and 160-2, defendants published and circulated certain printed matter urging the violent overthrow of the State and its political subdivisions and agencies "by force and violence, to wit, by sabotage of public transportation and communication facilities, assassination of police officers of said State and its various political subdivisions and agencies, and members of the State Guard of said State, and by other unlawful means, and with the further intent that said acts be presently attempted and accomplished." The third count charges that, in violation of §§ 160 and 161-4, defendants organized and helped to organize and became members of and voluntarily assembled with each other in

a society formed to teach and advocate the doctrine that the governments of New York and its various political subdivisions and agencies be overthrown by force and violence as described in the first count. The fourth count alleges a conspiracy to commit the crime alleged in the first three, Penal Law § 580. Two other counts charge that Samuels and Stewart permitted premises to be used for the assemblage of persons assembled for the purpose of advocating and teaching that the governments of the State and its various political subdivisions and agencies should be overthrown by force and violence.

The complaints, based in part upon the Civil Rights Act, 42 U.S.C. § 1983, seek an injunction against prosecution under the indictment or, alternatively, a declaratory judgment of invalidity, on the grounds that the New York criminal anarchy statute, Penal Law §§ 160, 161 and 163, violated the First Amendment of the Constitution of the United States, made applicable to New York by the Fourteenth, and entered an area exclusively occupied by the Federal Government, see Pennsylvania v. Nelson, 350 U.S. 497 (1956). They also attack § 596.3 of New York's Judiciary Law requiring that a juror "be the owner, in his or her own right, of real or personal property of the value of two hundred and fifty dollars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value" as violating requirements of the Federal Constitution that a person may be indicted only by a grand jury representing a fair cross-section of the community,[3] and § 586.6, now § 596.5, of the Judiciary Law in that it furnished no definable standards as to how grand jurors were to be selected. The defendants answered, seeking dismissal of the complaints. Finding that the complaints raised substantial questions under the Constitution, Judge Bryan requested the convocation of a court of three judges, 28 U.S.C. §§ 2281 and 2284. We now have before us motions by the plaintiffs both for a preliminary injunction against continuation of the prosecution and for summary judgment.

The New York criminal anarchy statute is an old one, going back to 1902. Its enactment was a response to the

assassination of President McKinley in Buffalo the preceding year, see People v. Gitlow, 234 N.Y. 132, 156 (1922) (dissenting opinion of Judge Pound). The language was very broad. Section 160 defined criminal anarchy:

> 'Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive hear or of any of the executive officials of government, or by any unlawful means.'

and made "the advocacy of such doctrine either by word of mouth or writing" a felony, without, however, prescribing a penalty. Section 161 [4] spelled out various types of acts within this general concept which constitute felonies punishable by imprisonment for not more than 10 years, fine of not more than $5000, or both. Section 162 forbade assemblages of two or more persons for advocating or teaching criminal anarchy, and § 163 forbade permitting such an assemblage—this being a misdemeanor punishable by imprisonment for not more than 2 years, fine of not more than $2000, or both. Under the new Penal Law, effective September 1, 1967, the various criminal anarchy sections are combined in a single provision reading as follows:

> '§ 240.15 Criminal anarchy
>
> A person is guilty of criminal anarchy when (a) he advocates the overthrow of the existing form of government of this state by violence, or (b) with knowledge of its contents, he publishes, sells or distributes any document which advocates such violent overthrow, or (c) with knowledge of its purpose, he becomes a member of any organization which advocates such violent overthrow.'

Plaintiffs mount a double-barreled attack on the old statute. They say although its constitutionality was sustained in Gitlow v. New York, 268 U.S. 652 (1925), over a dissent by Justices Holmes and Brandeis, later decisions of the Supreme Court, notably Dennis v. United States,

341 U.S. 494, 507-11 (1951), and Yates v. United States, 354 U.S. 298, 318-19 (1957), render it plain that *Gitlow* has been overruled and that a statute making the teaching or advocacy of anarchy a crime can be constitutional only if limited to those words or acts aimed at the violent overthrow of government which, as said in Schenck v. United States, 249 U.S. 47, 52 (1919), create "a clear and present danger that they will bring about the substantive evils" the legislature "has a right to prevent"—as, indeed, the New York Court of Appeals has recently recognized. People v. Epton, 19 N.Y. 2d 496, 281 N.Y.S. 2d 9 (1967), cert. denied and appeal dismissed for want of a substantial federal question, 390 U.S. 29 (1968). They add that the unconstitutionality of §§ 160-162 would not be removed even if—as they dispute—the instant indictment required proof of facts within the *Schenck-Dennis* formulation, since the overbreadth of the statute would have a "chilling effect" on persons desiring to engage in teaching or advocacy in the area between the central core that might be constitutionally forbidden and the broader circumference to which the statute extends. For this they find support in such decisions of the Supreme Court as Dombrowski v. Pfister, 380 U.S. 479 (1965), and Keyishian v. Board of Regents, 385 U.S. 589 (1967), and in decisions of three judge courts invalidating the Mississippi, Kentucky and California Criminal Syndicalism Acts, Ware v. Nichols, 268 F. Supp. 564 (D. Miss. 1967); Baker v. Bindner, 274 F. Supp. 658 (W.D. Ky. 1967); Harris v. Younger, 281 F. Supp. 507 (C.D. Cal. 1968). They contend in addition that the language of the former New York statute was broad enough to include teaching or advocating the overthrow of the Federal Government, a field held in Pennsylvania v. Nelson, *supra*, to have been preempted against the states by the Smith Act, 18 U.S.C. § 2385; indeed they point to a passage in one of the two majority opinions of the Court of Appeals in *Gitlow* which construed New York's criminal anarchy statute as extending that far, 234 N.Y. at 138 (opinion of Judge Crane). Against the point that the superseding indictment charged only attempting to overthrow state and local governments, they again argue overbreadth.

The State responds that, however all this might have been if the case had come to us some years back, plaintiffs' arguments are drained of their force by the decision in People v. Gitlow, *supra*, that court, with Judge Burke dissenting, reinterpreted the criminal anarchy statute "in accordance with sound constitutional principles so as to preserve its constitutionality." 19 N.Y. 2d at 505, 281 N.Y.S. 2d at 16. It held that the statute must be read as requiring not merely advocacy or teaching of violent overthrow of the government by force and violence but an intent to accomplish the overthrow and a "clear and present danger" that the advocated overthrow may be attempted or accomplished, 19 N.Y. 2d at 506, 281 N.Y.S. 2d at 17.[5] It held also, as we read the opinion, 19 N.Y. 2d at 17-18, that, as the new Penal Code makes plain, the old statute also must be confined to attempted overthrow of the government of New York or a local subdivision, thereby saving it from successful attack on preemption grounds, Uphaus v. Wyman, 360 U.S. 72, 76-77 (1959); DeGregory v. Att'y. General of New Hampshire, 383 U.S. 825, 829-30 (1966).

Far from welcoming this restriction of the area of permissible prosecution under the criminal anarchy statute, the plaintiffs protest it. They contend that the Court of Appeals had no power in 1967 to give the statute a narrower reading that the same court had found in 1922 to be the intent of the legislature of 1902. We do not understand why; it seems quite reasonable for the court to have ruled that if the 1902 legislature had known it could not have all it wanted, it would have wanted all it could have. Time and again the Supreme Court has narrowed the language of Congressional acts to save their constitutionality, see, e.g., Schneiderman v. United States, 320 U.S. 118 (1943), Bridges v. Wixon, 326 U.S. 135 (1945), and, most notably in the present context, in the case of the Smith Act whose language is nearly identical with the New York statute, see Dennis v. United States, *supra*, 341 U.S. at 502-11. We are unable to discern why an earlier broader reading should bar that course. In any event if the Court of Appeals transcended the powers vested in it by the people of New York by narrowing its

previous construction of the criminal anarchy statute, which we in no way intimate, this would be entirely a matter of state law and not one of federal concern.

Plaintiffs argue further, relying particularly on Dombrowski v. Pfister, *supra*, that, even if *Epton* would be a sufficient answer as to future criminal activity, the New York statute had not been thus narrowed to constitutionally permissible limits when most of the acts charged in the indictment were committed. The state counters that *Dombrowski* dealt with a situation where the statute could be brought within acceptable limits only "through a series of criminal prosecutions, dealing as they inevitably must with only a narrow portion of the prohibition at any one time, and not contributing materially to articulation of the statutory standard," 380 U.S. at 491. The Court, it says, there made clear it was speaking only of a case where "the conduct charged in the indictments is not within the reach of an acceptable limiting construction readily to be anticipated as the result of a single criminal prosecution," whereas here the Court of Appeals' adoption of the Supreme Court's reading of similar statutory language in *Dennis* was precisely such a construction and the acts are "the sort of 'hard-core' conduct that would obviously be prohibited under any construction." 380 U.S. at 491-92. The State caps its argument by citing a footnote in *Dombrowski* where the Court added, 380 U.S. at 491 n.7:

> Our cases indicate that once an acceptable limiting construction is obtained, it may be applied to conduct prior to the construction, see Poulos v. New Hampshire, 345 U.S. 395; Cox v. New Hampshire, 312 U.S. 569; Winters v. New York, 333 U.S. 507, provided such application affords fair warning to the defendants, see Lanzetta v. New Jersey, 306 U.S. 451; cf. Harrison v. NAACP, 360 U.S. 167, 179.

Plaintiffs contend that as to them the proviso as to "fair warning" was not met. In one sense it clearly was. Since the statute embraced more than it permissibly could embrace, it surely embraced the "hard-core" activities

with which they are charged. Cf. Winters v. New York, 333 U.S. 507 (1946). Although an unduly broad statute is objectionable on other grounds, lack of fair warning is not one; the case differs essentially from the unduly vague statute like that in Lanzetta v. New Jersey [belonging to a "gang"], which the Court's footnote cited as an example. Plaintiffs' point is a rather different one. Until *Epton*, they say, they had every reason to believe the New York criminal anarchy statute as construed by the Court of Appeals in *Gitlow* was unconstitutional. The *Dennis* opinion indicated this, no attempt at enforcement or amendment had been made thereafter, and they could not reasonably have anticipated that the Court of Appeals by overruling its earlier decision would restore life to an act that was moribund. Although under *Dombrowski* persons engaging in "hard-core" activities take their chances on "an acceptable limiting construction readily to be anticipated as the result of a single criminal prosecution," it is unreasonable, they say, to apply this rule when the statute has once been broadly construed by the highest court of the state even though—or perhaps particularly because—that construction would render the statute void under current constitutional doctrine.

The argument strikes us as somewhat artificial. The case is not like James v. United States, 366 U.S. 213, 221-22, 241, 242-47 (1961), where defendants were charged with wilfully failing to report income resulting from embezzlement which an earlier decision, never expressly overruled, had held they were not required to report. No court of New York had ever told the defendants they could engage in the type of activity charged in the indictment with impunity. The alleged non-enforcement of the New York criminal anarchy statute did not have the effect that might reasonable have been attributed to Connecticut's "undeviating policy" of non-enforcement of its anti-contraceptive statute in the face of flagrant violation, which could well have led citizens to believe they could flout the statute without risk of prosecution. See Poe v. Ullman, 367 U.S. 497, 502 (1961). Neither the complaints nor the moving affidavits allege that plaintiffs entertained the beliefs their lawyers now ingeniously im-

pute to them and, for reasons indicated, we do not understand why the *Epton* decision was not expectable. In any event this point, which would require an examination of defendants' state of mind, is the sort of issue that becomes ripe for constitutional adjudication only upon a fully developed record, see Eccles v. People's Bank, 333 U.S. 426, 434 (1948) (Frankfurter, J.); Wright, Federal Courts 391-92 (1963), cf. Bickel, The Least Dangerous Branch, ch. 4 (1962); United Public Workers v. Mitchell, 330 U.S. 75, 89-91 (1947), and would afford no basis for declaratory or, *a fortiori*, injunctive[7] relief.

Even if we should be wrong on this last point or as to plaintiffs' other arguments that *Epton* could not validate application of the old statute to them, see footnote 5, we would still consider the grant of such relief inappropriate under the special circumstances here presented. In saying this we are fully aware of the directives recently given by the Supreme Court, not only in Dombrowski v. Pfister, *supra*, but also in such cases as McNeese v. Board of Education, 373 U.S. 668 (1963), and Zwickler v. Koota, 389 U.S. 241 (1967), see also Cameron v. Johnson, 390 U.S. 611 (1968). However, the common thread running through all these cases—the need of federal declaratory or injunctive relief to protect plaintiffs' constitutional rights with respect to future conduct or events—is wholly absent here. The presently effective New York criminal anarchy statute, Penal Law § 240.15,[8] read in light of *Epton*, does not constitutionally restrict the First Amendment rights of these plaintiffs or of anyone else. We do not think that the Court in *Zwickler* had any intention to overrule the basic principles governing the propriety of declaratory or injunctive relief and to require a federal court to render a declaratory judgment whenever a present or prospective defendant shows that application of a state criminal statute to him would violate a constitutional right, even though there is no possibility that presenting the defense in a pending prosecution and seeking review in the Supreme Court if it is there rejected would "effect the impermissible chilling of the very constitutional right he seeks to protect." 389 U.S. at 252. Such a view would run directly counter to

the discussion in *Dombrowski*, 380 U.S. at 483-85. See also Pub. Serv. Comm'n. of Utah v. Wycoff Co., 344 U.S. 237, 243-44 (1952); Borchard, Declaratory Judgments 1022 (2d ed. 1941). *Zwickler* was a classic case for declaratory relief; the plaintiff needed to know promptly whether he could distribute anonymous handbills free of New York's threat of punishment. But, with New York law changed as it has been, the instant plaintiffs will not suffer any impairment of First Amendment rights to denounce the government of the state or its subdivisions if they must wait for a federal answer as regards conduct long since past until the state has determined what acts, alleged to be punishable under the statute and the Constitution, they have in fact committed. While their prospect of success in the New York courts may not be bright in view of *Epton*, in this instance Supreme Court review affords wholly adequate relief. See also Zwickler v. Boll, 36 L.W. 3440-41 (May 20, 1968).

We are not persuaded to a different view by plaintiffs' apprenhension that if they should be found guilty on other counts of the indictment, New York might seek to frustrate an appeal to the Supreme Court, as they contend it did in *Epton*, by making their sentences on the criminal anarchy counts concurrent with those on other counts. Not only is this entirely speculative but even if New York should do what plaintiffs fear and the Supreme Court should dismiss their appeal as it did in *Epton*, the Court would do that only because it felt there was no cause for federal concern. New York would have punished the plaintiffs for crimes—illegally possessing weapons and conspiring to commit arson—within its power, and, in light of the new statute and *Epton*, its doing so would have no "chilling effect" on persons desiring now or in the future to teach or advocate the overthrow of government within constitutional bounds. Plaintiffs' fear that New York will use an overbroad criminal anarchy statute in bad faith as a weapon for restraining constitutionally protected speech, while avoiding Supreme Court review, ignores that New York cannot do this so long as *Epton* stands. In contrast to Keyishian v. Board of Regents,

supra, we do have the benefit of a "judicial gloss," 385 U.S. at 601—and of a greatly simplified statute as well.

There remain the plaintiffs' two challenges, going to the entire indictment, which concern New York's method of selecting grand jurors. We have little doubt that, despite the decision of this court in United States v. Foster, 83 F. Supp. 197 (S.D.N.Y. 1949), cf. Fay v. New York, 332 U.S. 259, 291-94 (1947), application of even a modest property qualification for grand jurors might now be held unconstitutional, cf. Thiel v. Southern Pacific Co., 328 U.S. 217 (1946); Labat v. Bennet, 365 F. 2d 689, 723 (5 Cir. 1966), cf. Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), and New York has acted wisely in abolishing it, see fn. 3. However, the defendants have submitted an affidavit by the County Clerk of Queens County that the property requirement had no significance in his selection of jurors since he has long proceeded on the theory, whether factually correct or not, that everyone possessed the minimal amount of property specified. We find far less force in plaintiffs' attack on former subdivision 6, now 5, of § 596 of the Judiciary Law providing that to serve as a grand juror, a person must ". . . be intelligent; of sound mind and good character; well informed . . .," in the absence of evidence of abuse, see Swain v. Alabama, 380 U.S. 202, 205-06, 209 (1965); Chestnut v. New York, 370 F. 2d 1, 7 at n. 13 (2 Cir. 1966), cert. denied, 386 U.S. 1009 (1967), Rabinowitz v. United States, 366 F. 2d 34 (5 Cir. 1966), on which plaintiffs rely, did not hold such standards to be unconstitutional; the decision went rather on the ground that the clerk and the jury commissioner had superimposed additional standards of their own, designed in part to diminish the number of negro jurors, on the uniform standards enacted by Congress in 1957, 28 U.S.C. § 1861. However all this may be, we see no reason why plaintiffs' contentions as to grand jury selection cannot be effectively presented in the New York courts and to the Supreme Court on review. Douglas v. City of Jeannette, 317 U.S. 157 (1943); Stefanelli v. Minard, 342 U.S. 117 (1951). Indeed, these questions, going to the validity of this and many other indictments, seem peculiarly a matter to be

determined by the state courts in the first instance. Chestnut v. New York, *supra*, 370 F. 2d at 6-8, U.S. ex rel. Epton v. Nenna, 281 F. Supp. 388, 390 (S.D.N.Y. 1968).

Since the complaints present no case for federal relief, the Clerk is directed to enter a judgment of dismissal, as prayed by the State.

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U.S.D.J.

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U.S.D.J.

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U.S.D.J.

June 1968.

Footnotes

1. The Fernandez action was brought in the Eastern District of New York and transferred here by consent.

2. All references are to the former Penal Law, repealed September 1, 1967, unless otherwise stated.

3. Since subdivision 3 was repealed, effective September 1, 1967, plaintiffs' attack is necessarily limited to the State grand jury. Although the superseding indictment was filed thereafter, counsel advised us that this was returned by the same grand jury that had rendered the original indictment.

4. § 161. Advocacy of criminal anarchy

Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any

book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrine of criminal anarchy; or

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine.

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

5. We reject plaintiffs' claims that, even after *Epton*, the statutes under which they have been indicted are still unconstitutionally vague in scope. Four of their arguments merit discussion. First, while *Epton* does not expressly state that only when the speaker uses language that *incites to action* may he be prosecuted under §§ 160 and 161, see Yates v. United States, *id.* at 320-25, in the *Gitlow* case itself, both the Court of Appeals, 234 N.Y. at 149, and the Supreme Court, 268 U.S. at 664-65, so construed the statute. Though the indictment in the present case does not expressly charge incitement—indeed its charge that the defendants advocated the "duty" and "necessity" of overthrow was expressly held inadequate in *Yates*, *id.* at 324—it is the indictment, not the statute, that is overly broad in this respect. Second, while the Court of Appeals did not expressly deal with those clauses in §§ 160 and 161 that prohibit the advocacy of overthrow "by any unlawful means" other than force and violence, the fair implication is that these provisions have been read out of the statute. Third, we think it apparent that the same principle of construction applied in *Epton* would limit the

relevant portion of § 161-4 to becoming a member with knowledge that the society advocates the overthrow of government by force and violence and intends that this be accomplished. Contrast United States v. Robel, 389 U.S. 258 (1967). Finally, while the *Epton* court had no occasion to construe old § 163 which forbade any owner, agent or occupant "willingly and knowingly" to permit two or more anarchists the use of premises under his control it follows under the principles of the *Epton* decision that to violate § 163 one must know of the present danger of violence.

6. While Epton necessarily decided this issue adversely to the plaintiffs' argument, we cannot be certain whether the Supreme Court in dismissing the appeal, 390 U.S. 29, passed on that point or rested decision on the concurrent sentences on other counts.

7. The question whether the provision in the Civil Rights Act, now 42 U.S.C. § 1983, authorizing a "suit in equity," brings that statute within the exception of the anti-injunction statute, 28 U.S.C. § 2283, "except as expressly authorized by Act of Congress," is one of great consequence on which inferior federal judges have sharply differed and the Supreme Court has not found occasion to rule. See Dombrowski v. Pfister, *supra*, 380 U.S. at 484 n. 2; Cameron v. Johnson, 381 U.S. 741 (1965) and 390 U.S. 611 n. 3 (majority opinion) and n. 5 (dissenting opinion) (1968). Cf. City of Greenwood v. Peacock, 383 U.S. 808, 829, 852-53 (1966). The American Law Institute has proposed a much more limited exception. Study of the Division of Jurisdiction between State and Federal Courts, § 1372(7), Tent. Draft No. 6 (1968).

8. The new statute, among other things, eliminates the "any unlawful means" language of § 161-1 and 2, and the assemblage clause, § 163, and makes clear that membership is punishable only if accompanied by knowledge of the organization's purpose to advocate violent overthrow —in the *Epton* sense.

SUPREME COURT OF THE UNITED STATES

No. 844 Misc., October Term, 1968

FRED FERNANDEZ, APPELLANT

v.

THOMAS J. MACKELL, District Attorney, ET AL.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

December 9, 1968

SUPREME COURT OF THE UNITED STATES

Nos. 580 and 844 Misc., October Term, 1968

GEORGE SAMUELS, ET AL., APPELLANTS

v.

THOMAS J. MACKELL, District Attorney, ET AL.; and
FRED FERNANDEZ, APPELLANT

v.

THOMAS J. MACKELL, District Attorney, ET AL.

APPEALS from the United States District Court for the Southern District of New York.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and one hour is allotted for oral argument and No. 844 Misc. is transferred to the appellate docket as No. 813.

December 9, 1968

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 331036 432

No. 9

Issues. Statement not printed
(filed Sept 12, 1968)
Vide No. 7, for Motion to
dismiss or affirm
(filed Oct 26, 1968)
Reply to motion to dismiss
or affirm not printed)
(filed Nov 13, 1968)